

The Special Administrative Law Judge found claimant entitled to permanent partial general body disability benefits for a work-related injury occurring in May or June 1991.

Claimant appeals from the findings of the Special Administrative Law Judge and requests the Appeals Board review the finding of average weekly wage; however, that finding is dependent upon the finding of date of accident. The respondent and its insurance carrier request the Appeals Board to review the finding of nature and extent of disability. Those are the issues now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds, as follows:

Claimant is entitled to receive benefits based upon an average weekly wage of \$272.80 and a fifty percent (50%) permanent partial general disability for work-related injuries to both upper extremities and the right shoulder sustained while working for the respondent from May 1991 through September 9, 1991. For purposes of computation of this Award, the date of accident is designated September 9, 1991.

Respondent employed claimant from April 1981 through 1989 in a production job that required repetitive use of the hands, arms, and shoulders. After leaving its employ, claimant returned to respondent in April 1991 and worked without incident until May 3, 1991, when she struck her elbow on an oven.

After seeing the company physician, claimant began treatment with board-certified orthopedic surgeon Paul D. Lesko, M.D. of Wichita, Kansas. Dr. Lesko treated claimant from June 5, 1991, through July 31, 1991. Although Dr. Lesko restricted claimant from repetitive work, respondent placed claimant in the shrink-wrap job which required significant repetitive motion. While working shrink-wrap, claimant experienced pain in her left hand and arm that she reported to the doctor. Dr. Lesko thereupon recommended work hardening. Although Dr. Lesko intended claimant to work only four (4) hours per day and then participate in work hardening for four (4) hours, such intent was poorly communicated and claimant actually worked her eight (8) hour shift before attending work hardening. During work hardening, claimant's symptomatology in her upper extremities, shoulders, and neck significantly increased, and she developed pain in her feet. Claimant testified the pain in her feet has never resolved, nor did the pain in her left upper extremity.

Because her symptoms were worsening under Dr. Lesko's care, claimant requested the Administrative Law Judge to change physicians. The Administrative Law Judge appointed board-certified orthopedic surgeon Robert L. Eyster, M.D., of Wichita, Kansas, to evaluate and treat claimant. Dr. Eyster first saw claimant on September 9, 1991, and immediately took her off work. After a period of conservative treatment, in December 1991 Dr. Eyster performed surgery to release the right carpal tunnel and decompress the right shoulder. The doctor released claimant to return to work in March 1992, with restrictions. Respondent terminated claimant on April 24, 1992, due to lack of accommodated work.

At her attorney's request, on July 6, 1992, claimant saw Wichita physician Ernest R. Schlachter, M.D., for evaluation. Claimant advised Dr. Schlachter that after recuperation from her surgery she returned to work on March 20, 1992, and experienced increased symptomatology. However, claimant also told Dr. Schlachter her symptoms subsided after her termination in April 1992 to the level they were before her return.

Based upon the short period of time claimant worked from late March 1992 through the date of termination in April 1992, and the history claimant gave to Dr. Schlachter that her symptoms had subsided to the level they were before returning to work in March 1992,

the Appeals Board finds it is more probably true than not claimant did not experience additional permanent injury during March and April 1992. The Appeals Board finds it is more probably true than not that claimant's last date of accidental injury occurred on September 9, 1991, when Dr. Eyster took claimant off work for treatment and eventual surgery.

Because September 9, 1991, is the last date of work and last day claimant sustained mini-trauma to her hands and arms before her surgery, claimant's benefits are to be computed based upon the average weekly wage for that date. The wage information nearest September 9, 1991, covers the period April 12, 1991 through May 17, 1991, and indicates an average weekly wage of \$272.80, comprised of \$269.20 base wage and \$3.60 overtime. As of September 1991, claimant did not qualify for, nor receive, additional compensation items. Therefore, for purposes of computation of this Award, the average weekly wage is designated \$272.80.

Claimant has sustained a fifty percent (50%) work disability as a result of the injuries she sustained working for the respondent.

While treating claimant, Dr. Eyster diagnosed lateral epicondylitis, rotator cuff irritation, bursitis and tendinitis, and noted claimant complained of pain in her elbows, wrists, shoulders, neck and heels. Although Dr. Eyster found carpal tunnel syndrome in the right wrist and hand, he believed the overuse syndrome in the left wrist and hand was tendinitis. Dr. Eyster's final opinion is that claimant has experienced a ten percent (10%) impairment of function to the body as a whole as a result of permanent impairment to the right shoulder, right wrist, and left wrist. He believes claimant should be restricted from repetitive use of her hands, repetitive motions of her hands more than twenty (20) times per hour; repetitively pushing or pulling more than twenty (20) pounds; and, using vibratory tools. Although claimant continues to complain of pain in her feet, Dr. Eyster does not believe she has experienced permanent injury. In his opinion the bilateral plantar fasciitis will resolve if claimant will perform stretching exercises.

Dr. Schlachter's final diagnosis is overuse syndrome and tendinitis of both shoulders, overuse syndrome of both upper extremities with entrapment of the ulnar nerve on the right, bilateral carpal tunnel syndrome, bilateral epicondylitis, and calcaneal spurs and plantar fasciitis. Dr. Schlachter believes claimant has sustained a thirty-six percent (36%) permanent impairment of function to her body as a whole as a result of her injuries. He recommends claimant be restricted from repetitively pushing, pulling, twisting or grasping with either hand; lifting greater than ten (10) pounds with either hand; using vibratory tools; working in cold environments; using her arms overhead; walking more than two (2) miles in an eight (8) hour shift; climbing; and, significant kneeling and squatting.

Claimant's labor market expert, Mr. Jerry D. Hardin, testified claimant had lost fifty to sixty percent (50-60%) of her ability to perform work in the open labor market considering Dr. Eyster's restrictions and seventy-five to eighty-five percent (75-85%) of her ability to perform work in the open labor market considering Dr. Schlachter's restrictions. Although claimant testified at regular hearing she earns \$170.00 per week working full-time at a daycare center, Mr. Hardin believes claimant is capable of earning \$220.00 per week in the open labor market. He believes claimant could be a retail store clerk, fast food worker, fast food manager, assistant manager, or work in clerical-type positions similar to a receptionist.

Respondent's labor market expert, Ms. Karen Crist Terrill, testified claimant has a loss of ability to work in the open labor market of seventy-two percent (72%) using Dr.

Eyster's restrictions and seventy-five percent (75%) using Dr. Schlachter's restrictions. Ms. Terrill believes claimant's ability to earn comparable wage has not been affected by her injuries and believes claimant can return to work in a fast food restaurant and earn comparable pay.

Because her symptoms have continued without resolution since July 1991, the Appeals Board finds claimant has sustained permanent injury to her feet which limits her in her employment opportunities. Therefore, the Appeals Board finds that claimant has sustained a loss of seventy-five to eighty-five percent (75-85%) of her ability to perform work in the open labor market considering the opinions of both experts Hardin and Terrill when they factored in the restrictions pertaining to the feet. The Appeals Board also finds claimant retains the ability to earn \$220.00 per week which results in a twenty percent (20%) loss of ability to earn a comparable wage when this amount is compared to the pre-injury weekly wage of \$272.80.

Although the Appeals Board is not required to equally weigh loss of access to the open labor market and loss of ability to earn a comparable wage, there is no compelling reason in this case to give either factor greater weight. Therefore, the Appeals Board averages both the losses and finds claimant has sustained a fifty percent (50%) permanent partial general disability in accordance with K.S.A. 1992 Supp. 44-510e. This statute provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

The Appeals Board adopts the findings and conclusions set forth by the Special Administrative Law Judge in his Award dated February 28, 1994, that are not inconsistent with those expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated February 28, 1994, shall be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, Joy Hunter, and against the respondent, Gott Corporation, and its insurance carrier, Kemper Insurance Company, and the Kansas Workers Compensation Fund, for an accidental injury occurring on September 9, 1991, and based on an average weekly wage of \$272.80, for 27 weeks of temporary total disability compensation at the rate of \$181.88 per week in the sum of \$4,910.76 and 388 weeks of compensation at the rate of \$90.94 per week in the sum of \$35,284.72 for a 50% permanent partial general body disability making a total award of \$40,195.48.

As of December 16, 1994, there is due and owing claimant 27 weeks of temporary total disability compensation at the rate of \$181.88 or \$4,910.76, and 143.71 weeks of permanent partial general body disability compensation at the rate of \$90.94 or \$13,068.99

making a total due and owing of \$17,979.75, which is ordered paid in one lump sum less any amounts previously paid.

The remaining \$22,215.73 is to be paid for 244.29 weeks at the rate of \$90.94 per week until fully paid or further order of the Director.

Unauthorized medical expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

Future medical treatment and future vocational rehabilitation will be considered on claimant's application for such benefits.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Fund are hereby assessed one-half to the respondent and one-half to the Kansas Workers Compensation Fund to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Deposition Services	
Transcript of Proceeding (10/22/91)	\$49.20
Transcript of Regular Hearing	\$62.60
Barber & Associates	
Deposition of Joy Hunter	\$331.00
Deposition of Ernest R. Schlachter, M.D.	\$236.80
Deposition of Jerry D. Hardin	\$335.10
Transcript of Preliminary Hearing	\$110.90
Transcript of Proceeding (7/7/93)	\$70.00
Kelley, York & Associates	
Deposition of Paul D. Lesko, M.D.	\$162.25
Deposition of Robert L. Eyster, M.D.	\$187.98
Deposition of Karen Crist Terrill	\$220.30
Deposition of Gary Espy	\$476.90

IT IS SO ORDERED.

Dated this ____ day of December, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven R. Wilson, Wichita, KS
John L. Carmichael, Wichita, Ks
Andrew E. Busch, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director